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The Honorable Robert S. Lasnik

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Jeffrey Alan Rische, Plaintiff, v. United States, Defendant.	Case No. 2:16-CV-339-RSL **PLAINTIFF'S MOTION FOR SUMMARY JUDGEMENT** **Note on Motions Calendar: Feb. 24, 2017**

Plaintiff JEFFREY ALAN RISCHE ("Mr. Rische" or "Plaintiff") hereby moves, under Rule 56(a), Federal Rules of Civil Procedure ("FRCP"), for summary judgment in favor of Plaintiff upon all matters presented in the Complaint, on the grounds that there is no material issue of fact in dispute and that Mr. Rische is entitled to judgment as a matter of law.

This Motion is based on (i) the Declaration of Jeffrey Alan Rische, attached hereto as Exhibit A ("Decl."), and the documents attached thereto as Plaintiff's Exhibits 1 through 3, (ii) on matters admitted by Defendant UNITED STATES, (iii) on the following points and authorities, and (iv) on the record.

I. RELIEF REQUESTED

Plaintiff moves the Court to enter summary judgment in favor of Plaintiff and against Defendant and order Defendant to pay to Plaintiff all monies owed as pled in the Complaint with all interest allowed by law.

II. RELEVANT PROCEDURAL BACKGROUND

On March 7, 2016, Plaintiff filed his Complaint for Refund of Taxes (Doc. 1) ("Complaint"). On July 25, 2016, Defendant filed its Answer (Doc. 17) in which Defendant (a) denies that there was an overpayment for 2013, (b) denies sufficient knowledge of whether there was an overpayment for 2014, (c) admits that taxes were withheld from Mr. Rische's pay in 2013 and 2014 but, (d) at ¶17, denies that the taxes that were withheld from Mr. Rische's pay in 2013 and 2014 were paid over to the IRS. The Answer also asserts, without any affirmative allegations to support it, a prospective affirmative defense that the United States is entitled to reduce any overpayment "based on any additional tax liabilities that the Plaintiffs [sic] may owe, whether or not previously assessed or alleged" as a result of "the redetermination of plaintiff's entire federal income tax liability" for 2013 and 2014 which redetermination Defendant asserts is "at issue" in this refund suit. Doc. 17, pp. 8-9. By minute entry dated August 16, 2016, the Court set the trial of this action for May 1, 2017 (Doc. 19).

On August 31, 2016, Mr. Rische filed his Motion for Judgment on the Pleadings (Doc. 20) ("Motion for Judgment"). That motion was fully briefed by September 23, 2016, and the Court denied the motion on November 7, 2016 (Doc. 27) ("Order"). The Order stated that judgment on the pleadings was not appropriate because a material issue of fact existed as to whether or not Plaintiff made an overpayment for 2013 and 2014 ("the key question is whether overpayment actually occurred"). Order, p. 4. The Order relied on *Stead v. U.S.,* 419 F.3d 944, 947 (9th Cir. 2005) ("the essential element of [the Steads'] claim for alleged overpayment" was whether a levy and resulting debit from their bank account "resulted in the payment of funds from the Steads to the IRS"). The Order also relied on *Lewis v. Reynolds,* 284 U.S. 281, 283 (1932) (refund action resulting from audit, disallowance of deductions, and deficiency assessment, in which the Court stated that "[an] action to recover on a claim for refund is in the nature of an action for money had and received…")

Plaintiff also sought a protective order to narrow the discovery in this case to the issues actually raised in the pleadings (*see* Docs. 24-26) but the Court denied that motion as "moot" in the Order. On November 21, 2016, Plaintiff filed a Motion for Reconsideration of the Order (Doc. 28), and on December 14, 2016, the Court denied that motion (Doc. 29). Discovery in this case concluded on January 1, 2017 (*see* Doc. 19).

III. FACTS

The uncontroverted facts are set forth in Decl., and in paragraph nos. 1-2, 5, 8-17, 19-22, 24-25, and 28-29 of the Complaint (Doc. 1) and of the Answer (Doc. 17). The facts stated in the Rische Decl. are incorporated by reference.

The facts about which there is, or can be, no genuine dispute are as follows. Unless otherwise specified, all paragraph ("¶") references are to the Complaint, Doc. 1, and to the Answer, Doc. 17.

1. Plaintiff filed this suit against the United States for a refund of withheld taxes related to his administrative claim for a refund for tax years 2013 and 2014. (¶¶ 1-2 and 5);

2. On April 3, 2014, Plaintiff filed an original income tax return Form 1040EZ for tax year 2013 with the IRS at its Fresno campus via Certified U.S. Mail No. 7008 1140 0004 3224 3087 ("2013 Return"). (¶ 8.)

3. The IRS received the 2013 Return on or about April 22, 2014. (¶ 9.)

4. Plaintiff timely filed an original income tax return Form 1040EZ for tax year 2014 with the IRS ("2014 Return") (collectively, "the Returns"). (¶ 10.)

5. Defendant received the 2014 Return on or about April 10, 2015. (¶ 11.)

6. Each of the Returns claims an overpayment of taxes. (¶ 12.)

7. Each of the Returns shows an election that the overpayment be refunded to the Plaintiff. (¶ 13.)

8. The 2013 Return indicates that the overpayment claimed constitutes amounts withheld from non-wage amounts that the payer owed to the Plaintiff. (¶ 14; Decl. ¶¶ 4, 6-13.)

9. The 2014 Return indicates that the overpayment claimed constitutes amounts withheld from non-wage amounts that the payer owed to the Plaintiff. (¶ 15; Decl. ¶¶ 4, 6-13.)

10. Plaintiff sent several letters to Defendant further describing the basis of Plaintiff's dispute and claims for refund for 2013 and 2014 and demanding a refund. (¶ 16; Decl. ¶ 14)

11. Taxes were withheld from Plaintiff. (¶ 17; Decl. ¶ 5)

12. Plaintiff has never received a Notice of Deficiency for either 2013 or 2014. (¶ 19; Decl. ¶ 16.)

13. Defendant has not executed a §6020(b) return for Plaintiff for 2013 or for 2014. (¶¶ 20-21; Decl. ¶ 17.)

14. Plaintiff has received no refund of the overpayment shown on the Returns. (¶ 22.)

15. The IRS has not failed to process the 2013 and 2014 Returns. (¶¶ 24 and 28.)

16. The IRS never contested the validity or accuracy of the Returns. (Decl. ¶¶ 15-19.)

17. The IRS has not refunded Plaintiff's overpayment shown on the 2013 Return (¶ 25) and has not refunded Plaintiff's overpayment shown on the 2014 Return (¶ 29).

18. The amounts that were withheld from Plaintiff's 2013 pay by Plaintiff's company, Lightspeed Design, Inc., were, in fact, paid over to the IRS on September 24, 2015, and the IRS received those payments on or about September 28, 2015. Decl., p. 4, ¶¶ 20-21 and Exs. 1 and 2.

19. The amounts that were withheld from Plaintiff's 2014 pay by Plaintiff's company, Lightspeed Design, Inc., were, in fact, paid over to the IRS on November 3, 2015, and the IRS received those payments on or about that date. Decl., p. 4, ¶¶ 20-21 and Exs. 1 and 3.

POINTS AND AUTHORITIES

IV. LEGAL STANDARD

Under FRCP, Rule 56, the court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

The moving party carries the initial burden of demonstrating an absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Plaintiff must either produce conclusive evidence negating Defendant's defense, or, in the alternative, must show that Defendant lacks evidence sufficient to support its defense. The U.S. Supreme Court has stated:

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether … there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986).

The relevant substantive law determines the facts material to the litigation's outcome. *Id.* at 250. Material facts must be viewed in the light most favorable to the non-movant. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986). A court must consider "only disputes over facts that might affect the outcome of the suit under the governing law." *Anderson, supra*, 477 U.S. at 248-249. "No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *Cal. Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.,* 818 F.2d 1466, 1468 (9th Cir. 1987). A mere "scintilla" of evidence supporting the non-moving party's position is insufficient to withstand summary judgment. *Rivera v. Philip Morris, Inc.,* 395 F.3d 1142, 1146 (9th Cir. 2005) (citing *Anderson,* 477 U.S. at 248). A party that bears the burden of proof has the burden of establishing a *prima facie* case on its motion for summary judgment. *See UA Local 343 United Ass'n of Journeymen, et al. v. Nor-Cal Plumbing, Inc.,* 48 F.3d 1465, 1471 (9th Cir. 1994).

V. ARGUMENT

Plaintiff's Motions for Judgment and for Reconsideration argued that all of the facts alleged in the Complaint that are material to the adjudication of this case are admitted in the Answer, and that each of the few denials in the Answer and the statements in the section entitled "Affirmative Defenses" either is a matter for which Defendant has the burden of proof but which is insufficiently pled, or is an unsupported hypothetical, argument or legal conclusion.

The Order denying the Motion for Judgment characterized the assertion in the Answer that no overpayment was received by the IRS as a denial of a necessary element of Plaintiff's refund claim, and denied the Motion for Judgment on that basis. The Court appears to take the position that the government defends this refund action by alleging that Mr. Rische did not make an overpayment for the years 2013 and 2014 (an allegation that does not actually appear in the Answer), and therefore there is nothing for the Defendant to refund. If the Answer and Defendant's papers in this case may be construed to assert such a defense, it is the government's burden to prove it,[1] but in any event it now summarily may be disposed of on the facts of this case and on the documents appended to the Declaration of Jeffrey Rische ("Rische Decl."), as discussed in more detail below.

It is undisputed that Mr. Rische had no taxable income and no tax liability for 2013 and 2014. As a matter of law, any amount collected against a liability of $0.00 is an overpayment. IRC §6401(b)(1) ("If the amount allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to refundable credits) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subparts A, B, D, and G of such part IV), the amount of such excess shall be considered an overpayment") and §6401(c) ("Rule where no tax liability - An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact

[1] *See, e.g.*, *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1039 (9th Cir. 2013).

that there was no tax liability in respect of which such amount was paid.") The "Subpart C of part IV of subchapter A of chapter 1," to which §6401(b)(1) refers, states: "The amount withheld as tax under chapter 24 shall be allowed to the recipient of the income as a credit against the tax imposed by this subtitle." IRC §31(a)(1). "For credit against the tax imposed by this subtitle for overpayments of tax, see section 6401." IRC §37. The law does not require proof of receipt of funds by the IRS in order to obtain a credit against the tax imposed. In this structure, the one withheld from seeks recourse with the government (*see* §§6402 and 7422), and the government's collection recourse, if needed, is with the withholding entity. *Slodov v. United States*, 436 U.S. 238, 243 (1978). Therefore, the statutory structure does not place any onus on the taxpayer seeking a refund of the amount credited against the tax imposed to prove that monies no one disputes were withheld from him were actually received by the IRS.

That said, Mr. Rische can now prove that the monies he claimed to overpay were, indeed, not only withheld from his pay but were paid over to the IRS in late 2015. Defendant's assertions to the contrary are not only untrue – they are frivolous. These assertions also evidently were made in bad faith, because the government Defendant and its counsel had access to this information for almost a year before it filed its Answer, and had an ongoing duty not only of complete disclosure to the Plaintiff, but also of candor to this Court.

As the uncontested Returns establish, there is no tax imposed by Subtitle A on Mr. Rische's earnings for 2013 or 2014. Therefore, the amounts withheld from Mr. Rische's earnings are allowed to Mr. Rische as credits which exceed the tax of $0 imposed for each year, and are, therefore, considered to constitute "overpayments" that must be refunded to him under §6402. The Court identified an issue of fact as to whether the withholding agent of Mr. Rishe's company payer paid over these amounts to the IRS. From the documents that Mr. Rische has uncovered, this issue is now resolved in Mr. Rische's favor. The amounts withheld from him in 2013 were paid over to the IRS on September 24, 2015, and the amounts withheld from him in 2014 were paid over to the IRS on November 3, 2015. Decl., ¶¶ 20-22 and Exs. 1-3. If Mr. Rische has any burden of proof at all here under the superseded *Lewis*[2] (which he does not), or under the statutes that superseded *Lewis*[3] (which he also does not), it is nothing more than to show that the United States *received* the money that had been withheld from him for 2013 and 2014. *See Stead, supra,* 419 F.3d at 947 (regarding whether the IRS actually had ever received the amount that the Steads were reclaiming). This, Mr. Rische has now conclusively done.

The United States has denied none of the material allegations in the Complaint, and Mr. Rische has alleged every fact necessary to establish his refund claim. It is undisputed that Plaintiff's company withheld the amounts that Mr. Rische claimed on his IRS Forms 4852, and it is undisputable that Lightspeed paid over those amounts to the IRS well before Mr. Rische filed his refund claim.

Because Defendant (1) admitted that an overpayment was claimed on each Return, (2) decided against disputing the contents of the Return (*i.e.,* failed to challenge the validity of the tax treatment accorded any item found in either Return), (3) falsely alleged that withholdings were not paid over to the IRS, (4) failed to make any affirmative allegations of fact with respect to Mr. Rische's claimed overpayments, and (5) failed to produce to Plaintiff any documents or affidavits supporting its defense, Defendant's "denial" that there was an overpayment for one of the years—and a "denial" for lack of information as to the other—does not raise a material issue of fact for trial and cannot withstand summary judgment.

As to Defendant's assertion as an affirmative defense that "the redetermination of plaintiff's entire federal income tax liability for the litigated tax years" is at issue and necessary because "the United States is entitled to reduce that overpayment based on any additional tax liabilities that the Plaintiffs [sic] may owe," Defendant has produced nothing to meet his burden of proof with respect to this affirmative defense. The government has not met even its threshold burden to establish that its defense is justiciable.

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[2] *Sokolow v. United States*, 169 F.3d 663, 665 (9th Cir. 1999) ("However, Congress superseded Lewis, by statute").

[3] *See, e.g.,* 26 U.S.C. §6201(d) and §7491(a).

> [W]hen the government by way of a setoff challenges the validity of the tax treatment accorded an item found in the same tax return. . ., we think that the burden of proving the correctness of the challenged item is ultimately on the taxpayer . . . .

Missouri Pacific Railroad Company v. United States, 338 F. 2d 668, 671 (Crt. Cl. 1964). Of course, in this case, the government *has not* "challenged the validity of the tax treatment" of any item on either the 2013 or the 2014 Return, which challenge, if *Lewis* controlled without the operation of the burden-shifting statutes that superseded it, might have given rise to a burden of proof for Plaintiff.

> However, before the taxpayer has the burden of proving the correctness of the challenged item . . . , we think that the government has the burden of going forward and showing that there is a reasonable basis in fact or in law for its setoff defense. By this we mean that the government has to demonstrate that it has some concrete and positive evidence, as opposed to a mere theoretical argument, that there is some substance to its claim and is not a mere fishing expedition or a method of discouraging taxpayers from seeking refunds on meritorious claims because of the cost that would result in proving each and every item involved in a tax return. In a case where the taxpayer raises specific issues as to a tax, and there is no good reason for the government to challenge the remainder of the items going to make up the tax, the government should not be able to cast the burden on the taxpayer of proving each and every item. The right of allowing an offset under these situations is an equitable right given to the government based on the equitable principles and, as such, should not be abused. If properly used, it should provide the government with a "shield" to prevent the unjust enrichment of a taxpayer, but if used as a "sword" it would under certain circumstances have the contrary effect.

Missouri Pacific, 338 F. 2d at 671-672 (Crt. Cl. 1964). Here, the government has not offered, and cannot offer, any "concrete and positive evidence" that there is any substance to its setoff defense. Defendant has admitted the material facts alleged in the Complaint but suggests a potential right to *reduce* the amount it owes to Plaintiff after the application of unpled and unspecified "other offsetting tax liabilities" (Response to Motion for Judgment, p. 8) or unpled and unspecified amounts "not paid over to the IRS" (Doc. 17, ¶17). *See* Doc. 17, pp. 8-9. But Defendant is unable to introduce any evidence of any prospective "additional tax liabilities" that would offset the amounts Defendant is required to refund to Plaintiff for the 2013 and 2014 claims.

A potential for *future reduction* of liability does not defeat a refund claim. The right to setoff refers to debts and obligations that were incurred *prior* to the commencement of the refund action, not to *potential future* obligations. *See Patterson v. Belcher,* 302 F. 2d 289 (5th Cir. 1962) ("The Director is entitled to set off any monies *still owing* to the Government against the amounts claimed for refund," emphasis added) *citing Lewis v. Reynolds,* 48 F.2d 515 (10th Cir. 1931), *affirmed* 284 U.S. 281, 52 S.Ct. 145, 76 L. Ed. 293 (quoting Section 322 (a) of the Revenue Act of 1928 stating that overpayments may be credited against taxes "then due" from the taxpayer). *See* 26 C.F.R. § 301.6402-1 Authority to make credits or refunds (overpayment is offset against "any outstanding liability for any tax"). Even if a setoff were available to reduce or eliminate Mr. Rische's claimed refund, it may not give rise to a judgment in favor of the government. *Patterson, supra*. But no setoff is available because there is no allegation, let alone any evidence, that Mr. Rische owes anything to the government for the years 2013 and 2014 to which his overpayments for those years may first be applied before issuing his refunds.

The facts and documents in this case support Plaintiff's *prima facie* case, and do not support Defendant's defense. Because the United States cannot meet its burden of proof, and Plaintiff has established that overpayments were, indeed, received by the IRS for the litigated years, Plaintiff is entitled to judgment as a matter of law.

VI. CONCLUSION

No genuine issue for trial remains, and Mr. Rische is entitled to summary judgment as a matter of law, a refund of all amounts claimed in the Complaint, and an award of interest as allowed by law.

Plaintiff so prays.

Respectfully submitted this 31st day of January, 2017.

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